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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 300

SOCONY MOBIL OIL COMPANY, INC.,
Petitioner,

v.

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS CO.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT CO., AND
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Respondents.

REPLY BRIEF OF SOCONY MOBIL OIL COMPANY, INC. ON PETITION FOR CERTIORARI

THOMAS FLETCHER
2025 First City National
Bank Bldg.
Houston 2, Texas
Attorney for Respondent
Socony Mobil Oil
Company, Inc.

Of Counsel:
JOHN L. DANIEL
First City National Bank
Building
Houston 2, Texas.

September 10, 1962

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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The Brief in Opposition of Respondents Brooklyn Union Gas Company, et al, seeks to distort the perspective of the Application, and we beg leave to file this Reply.

1.

Respondents Brooklyn Union, et al, (Brooklyn Union) do not meet the issues tendered or pretend to answer the cases

cited.[1] They beg the question upon pyramided assumptions that Commission jurisdiction over Mobil had been determined (though at all pertinent times it was being contested by judicial proceeding and no determination, administrative or judicial, was made); further, that there was an established violation of procedural regulations, §74 and 174-A, (applicable only to those who had either voluntarily filed or filed pursuant to determination of jurisdiction); and, finally, that the general procedural regulation of Order 174-A in the light of the foregoing assumptions furnished the basis for judicial determination of lawfulness, i. e., justness and reasonableness, a power statutorily granted only to the Commission.

The numbered paragraphs (Br. 1-2) illustrate this. The fact that there was no filed rate Brooklyn Union ignores. The claim that "change in rate" is the genesis of judicial right equally ignores the fact that Section 4(d) of the Act provides only for change of a "filed" rate (Pet. p. 12-17).

The suggestion that validity of Order 174-A is involved is a quibble. Whether Order 174-A constitutes rate-fixing as the Court held is studiously avoided.

Equally misleading is the claim that the courts below did not actually and necessarily invade the primary jurisdiction of the Commission and exercise its powers (Br. 2-3, 9-11, 19, 21). Paragraph 22 (Complaint, R. 37) contrasts a figure allegedly "the only lawful rate and charge" with a stipulated contract figure charged and paid, alleged to be unlawful. From this stemmed all of the various allegations in the complaint (R. 31, et seq), and the courts were invited to, and did, determine the one to be lawful, the other to be

[1] At top of page 13, Brooklyn Union cite cases dealing with restitution. These are not addressed to any question presented in the petition. (See FN. 10, Pet. p. 6). If this writ be granted, Mobil will, on the merits, distinguish and demonstrate inapplicability of these cases.

unlawful, and ordered a refund of the difference. It is inexcusable for Brooklyn Union to assume the issue that filing equates unlawfulness when Section 4(a) of the Act proclaims the only unlawful rate to be one unjust and unreasonable.

Mobil's failure to file, contesting jurisdiction, created a void, so that the courts below invested procedural Order 174-A with rate-making power, denied to the Commission by the Act; and used that as the norm to determine lawfulness under the Act for purposes of the directed refund. Thus such administrative determination was confessedly made by the courts below, and governed throughout all pertinent times.

A careful reading of the trial court's statement (Br. 4-7) discloses the fundamental misconception of the Act and Order 174-A to the effect described in Mobil's petition. By this misconception both courts below were misled and exercised prerogatives not possessed.

Brooklyn Union is silent as to why it failed to exhaust available administrative remedies under the Commission's Rules of Practice (Pet. 44).

In our submission Brooklyn Union does not escape or destroy the seriousness of the law questions presented by Mobil's petition by the mere naked declaration that such issues do not exist.

2.

The cases cited (Br. p. 9) do not warrant the preceding claims. *Nat. Gas Pipe* v. *Harrington* (5 Cir. 1957) 246 F. 2d 915, 919, cert. den. 356 U. S. 957, notes Orders 174 and 174-A, but concludes they merely fixed a time within which producers "*could* file", not *must* file as the same court held here. Restitution was based upon a specific contract and assumption thereto (p. 917-8) not on Orders 174 or 174-A as here.

Though "clear to all of the parties that the contract should have been filed," no resulting invalidity from failure to file was suggested either from the Act or said Orders. (p. 919) Instead the *unfiled* contract was declared controlling subject only to the Commission's Section 5(a) power. (p. 919)

The sentence "Any price in excess of the contract rate, was then contrary to the spirit, if not the letter, of the Natural Gas Act." (p. 919) furnishes no comfort to Respondents. The "excess" was the Oklahoma Commission Order, invalidated by *Nat. Gas Pipe. Line Co.* v. *Panoma* (1955) 349 U.S. 44. In *Harrington* such excess paid was contrary to the specific terms of the contract, thus wrong; but here no payment in excess of the contract rate was at any time demanded or paid.

In the other cases cited (Br. p. 9) each producer admitted jurisdiction and attorned by voluntary filing. They then were held to the governance of the procedural regulations of Order 174-A. None declared Order 174-A a rate-fixing order. Such cases demonstrate conclusively applicability of procedural Order 174-A only after filing.

The procedure of Order 174-A, applicable only to those admittedly or determined to be subject to regulation, did not purport to fix and make a lawful rate, but to establish a cut-off filing date behind which, because of the overwhelming administrative task entailed by producer regulation, the Commission would not review rate lawfulness, but beyond which the normal procedure established by the Act for rate review would become applicable. Since Section 5(a) permits review prospectively of a rate filed and then applicable, and Section 4(e) permits similar review of new filed rates retroactive to the effective date: administrative convenience was served by treating filed rates different from those filed as of the cut-off date as a change in rate. This not only placed the burden on the regulated company to justify the

rate, but guaranteed the review could be retroactive to the effective date. (Sec. 4(e)). The courts held this to be a reasonable accommodation to the dispatch of the torrent of administrative filings which the now famous *Phillips* case precipitated. This is not rate-making, nor a formula of lawfulness, but a plan for orderly disposition of filings.

3.

The statement (Br. p. 10) that Mobil "deliberately sought to evade the provisions of Section 4(d) and Order 174-A by litigation and the stay order" is not only untrue, but wholly without warrant or support in the record.

4.

The bland assurance (Br. p. 10-11) that Mobil and Ohio are the last parties who might have the issue here involved is absurd. So long as the Act exists questions will continue to arise, whether jurisdiction exists, and inquiry will be required into the various consequences on contracts, rights, and relations of parties springing from such controversies; as well as the roles and powers of parties, the Commission, and the courts, relating thereto. Authoritative settlement by this Court of the questions here for guidance of the parties, the Commission, and all courts is in the public interest.

Equally foolish is the statement (Br. p. 11) that all independent producers are now operating under the Act. There is no edict, legislative, administrative, judicial, or business, that makes presently regulated producers the only ones forever henceforth subject to the Act, or that forbids any producer, presently non-jurisdictional, or one who may hereafter become a producer, from engaging in a sale subject to the jurisdiction of the Act.

Mobil's present application rests wholly on its merits as a proposition of law.

5.

The statements (Br. p. 11-13) about the stay order are incorrect. What Mobil said is clear and not to be distorted (Pet. p. 8-10). The stay order did not purport to set rates or permit one rate to be collected over another. It furnishes no basis for restitution within the historical meaning of the doctrine.[2]

The statement (p. 13, 16) that the stay relieved Mobil of the duty to file is untrue. In *Magnolia Petroleum Company v. F. P. C.* (5 Cir. 1956) 236 F. 2d 783, cert. den. 352 U. S. 968, Mobil contended that Order 174-A did seek to compel a filing, which it declined to make because not subject to jurisdiction. The court held the order did not so require, and could affect Mobil only upon the contingency of future and further administrative action. Filing, if required, was not required by Order 174-A, but by the Act, which the stay order did not pretend to affect.

The claim that in an enforcement suit the courts would have been deterred from enforcing the mandate of Congress by the stay of a Commission procedural Regulation, which could not supersede or rise superior to Congressional command, is pure sophistry. Mobil at no time has agreed that the stay order relieved it from a duty to file.

6.

The effort (Pet. p. 13) to confuse this judicial act of determination with mere judicial identification is nonsensical. The undoubted power of a court to identify the filed effective rate is not involved here or questioned, as Re-

[2] Brooklyn Union (Br. p. 11) purports to state Ohio's position. On that Mobil expresses no opinion. That is the concern of Ohio. If it takes the position ascribed, such is not compulsory upon Mobil.

spondents well know. There being no filing or recognition of jurisdiction by Mobil, the courts below refused to recognize the contract rate as effective; instead, assumed the toga of the Commission, established and determined a just and reasonable rate, condemned another as unlawful, and directed reparations. In our submission the Court may not so exercise such administrative power.

7.

Brooklyn Union either misread *Willmut* (Pet. 19-20) and the Fifth Circuit's recent decision in *Hunt* v. *F. P. C.* (No. 19065, et al. decided July 19, 1962), or refuse to understand their holdings.

The court below held that a procedural regulation Order 174-A fixed rates, a power denied the Commission by the Act. Mobil's contention is the regulation may not be given such legislative effect. *Willmut* held that the Commission did not abuse its discretion in failing to adopt a regulation prohibiting filings under Section 4(d) because it had no such power.

In *Hunt*[3] a certificate application for a new sale resulted in a temporary certificate with a condition of a lower price, and a further condition that such lower price could not be changed during the continuance of the temporary certificate by the procedure of Section 4(d) of the Act. Because of the newness of this decision, we beg the Court's permission to quote three excerpts from that opinion which show the path to decision followed by the Fifth Circuit. In striking down such condition, the Court said:

[3] This case came to Mobil's attention after its petition had been forwarded for filing. By letter to the Clerk of August 6, 1962, copy to counsel, Mobil advised that it would contend that *Hunt* supported Point II (Pet. p. 17-20) and also constituted an intra-circuit conflict (Pet. p. 16).

"But we view the express prohibitions of § 4 increases as beyond the pale of administrative discretion. We do not think that under the guise of a condition of a temporary authorization, the Commission can forbid what Congress has expressly allowed to a natural gas producer. (p. 12, Folio copy).

* * *

"To allow this prohibition of § 4 condition, we would be as much as saying that in determining whether the addition of the proffered gas to the interstate market serves the public interest the rates to be prescribed are not those fixed under the sales contract by the parties. Rather the rates are those (a) fixed by the Commission in the first place and which are to continue until (b) the Commission itself fixes another level. This is a complete abandonment of the approach deliberately selected by Congress, and which, all must agree, was a radical break with traditional utility-type regulation.

"The consequences are too awesome for us to assume that Congress ever committed such undefinable legislative judgments to an administrative agency. (p. 16, folio copy)

* * *

"And, finally, the condition is so awesome because — and it is no more *reductio ad absurdum* to say — if the Commission may set aside § 4 and the rights, privileges and protections which it accords to a natural gas company subject to all of the obligations of the Act, then there is no end to the legislative tampering which the Commission may undertake. It may just as well deny the producer the right of review by rehearing or petition to the Courts under § 19(b)[19]." (p. 20-21, Folio copy.)[4]

Thus, in the instant case the court below accords to a procedural regulation, Order 174-A, a legislative effect to

[4] So stoutly did the Fifth Circuit feel that it closed its opinion with this striking sentence of obvious allusion: "That which Congress has joined together, let not the Commission put asunder."

permit utilization of power denied. But in *Hunt* the same Court of Appeals, in strong and striking language, prohibits similar action and indicates the extraordinary evil and abuse which could result were such power to be recognized in the Commission. If the court below in this case had followed the unanswerable logic employed so strongly in *Hunt*, it would have reversed the trial court with directions to dismiss the cause because of failure to state a federally cognizable cause of action, the chief cornerstone of Mobil's position.

Respectfully submitted

THOMAS FLETCHER
2025 First City National
Bank Bldg.
Houston 2, Texas

Attorney for Socony Mobil Oil
Company, Inc., Petitioner.